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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 457

PATRICK J. HURLEY, SECRETARY OF WAR, ET AL.,
Petitioners,

versus

R. FOSTER KINCAID, SR.,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RESPONDENT, R. FOSTER KINCAID, SR.

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INDEX.

	Page
Statement of the Bill and Proceedings Below	1-11
Uncontradicted Facts	11-22
Jurisdiction	22-24
Argument:	
(a) On the Right to Injunction	24-29
(b) The Right to Restrain Federal Officers	29-32
(c) The Fifth Amendment	32-35
(d) Summary of the General Law	35-56
(e) Facts in Support of Propositions of Law in Subdivision "C"	56-60
Reply to Petitioner's Argument	60-83
Conclusion	83

CITATIONS.

Cases:

210 American Cases 1918, 1201	41
Alabama Power Co. v. Gulf Power Co., 203 Fed. 606	30
Ambler Realty Co. v. Village of Euclid, 207 Fed. 312	41
Ashland Electric Power Co. v. City of Ashland, 217 Fed. 158	24, 28
Bass v. Metropolitan R. Co., 82 Fed. 857, 27 C.C.A. 147	27
Bedford v. U. S., 192 U. S. 217	44
Belknap v. Schild, 161 U. S. 10	30
Buchanan v. Walley, 245 U. S. 74	41
Blevins v. Hines, 264 Fed. 1005	24
Blocks v. Hirsh, 256 U. S. 185	41
Bolton v. McShane, 62 Iowa 207, 25 N. W. 135	26
Bowdith v. Boston, 101 U. S. 16	46
Boyd v. U. S., 116 U. S. 616	81
City of Toledo v. Toledo Rys. Co., 259 Fed. 450	24, 28
Cleveland, etc., R. R. v. Backus, 154 U. S. 139	41
Cummins v. Miss. River Comm., 241 U. S. 351	35

CITATIONS—(Continued).

Cases—(Continued):

	Page
East & W. R. of Alabama v. E. T. V. & G. R. Co., 75 Ala. 280.	26
Gibson v. U. S, 166 U S. 269	44
Goltra v. Weeks, 46 Sup. Ct. 613	30
Little v. Barreme, 2 Cranch, 170	30
McElroy v. Kansas City, 21 Fed. 261	27
Monongahela Nav. Co. v. U. S. 148 U. S. 312	39, 48
Noble v. Union River Logging Co., 147 U. S. 165	31
D. M. Osborne & Co. v. Mo. Pacific R. R. Co., 147 U. S. 248	28
Peabody v. U. S., 231 U. S. 531	43
Penn. Co. v. Mahon, 260 U. S. 414, 393	41, 45, 56
Philadelphia v. Stimpson, 223 U. S. 605	30, 31
Pine v. City of New York, 103 Fed. 337	27
Portland Railways & Light Co. v City of Portland, 210 Fed. 667	24
Pumpelly v. Green Bay, 13 Wallace 166	44, 52
Ranson v. Bush, 251 U. S. 182	41
Richards v. Washington Terminal Co., 233 U. S. 546	42
School of Magnetic Healing v. McAnnulty, 197 U. S. 94	31
Scranton v. Wheeler, 179 U. S. 141	30, 31
Slaughter House Cases, 16 Wall. 36-82	60
Smith v. Kansas City Title Co., 255 U. S. 180	24
Spade v. Lynn & Boston R. R. Co., 172 Mass. 488	46
St. Louis & San Francisco R. Co. v. City of Tulsa, 213 Fed. 87.	26
Thornton v. Road Imp. Dist. No. 1, 291 Fed. 518	24, 28
Tindal v. Wesley, 167 U. S. 204	31
U. S. v. Cress, 243 U. S. 716	39, 46
U. S. v. Lee, 106 U. S. 196	30, 31
United States v. Lynah, 138 U. S. 445	39
United States v. Rio Grande Dam, 174 U. S. 690	35
United States v. Welsh, 217 U. S. 330	44
Wilmington City Ry. Co. v. Taylor, 196 Fed. 158	24, 28

CITATIONS—(Continued).

Decisions on Case Below:	Page
District Court, 37 Fed. (2nd) 235	9
District Court, 37 Fed. (2nd) 602	10
Circuit Court of Appeals 5th Circuit, 49 Fed. (2nd) 768	10
Text Writers:	
Lewis Eminent Dom. Sec. 632	26
Pomeroys Equity Sec. 465	26
Dillon—Laws & Jurisprudence, p. 208	81
Statute:	
Flood Control Act of May 15, 1928	3, 20, 36, 37
Documents:	
Report of Chief of Engineers	12, 13, 14, 15
Evidence of Chief of Engineers before Flood Committee of House	18
Extracts from Testimony:	
Capt. Dean	66, 67
M. T. Berthe	68
J. P. Kemper	69

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RESPONDENT, R. FOSTER KINCAID, SR.

This is a suit in equity. The respondent instituted this suit in the United States District Court for the Western District of Louisiana, Monroe Division, to enjoin the United States; James W. Good, Secretary of War; Major General Edgar Jadwin, Chief of Engineers; the Mississippi River Commission; T. H. Jackson, Charles H. West, Robert,

L. Faris, Edward Flad, John H. Stipes, Jarvis Bain, an Ernest Graves, members of the Mississippi River Commis sion; and Major John C. H. Lee, District Engineer, de fendants, from proceeding to construct certain guide levee and other work contemplated by the Flood Control Act o May 15, 1928, until said parties had first obtained the right to take the property of respondent either by condemnation or purchase.

The bill states that it is a suit of a civil nature and is a controversy arising under the Constitution and laws of the United States, to-wit, the fifth amendment to the Constitution of the United States and an act of Congress. That it is also a suit of a local nature and involves the title of land situated in the western district of Louisiana. That the amount in controversy, exclusive of interests and costs exceeds the value of $3,000.00 and is less than the value of $10,000.00. That on May 15, 1928, the United States Government, by an Act of Congress, adopted a project for the control of floods of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927. That the said adopted plan of project differed from the old Flood Control system of levees and levees only, by providing for the creation of certain diversion channels by which the water of the Mississippi River was diverted and taken out of the main river. That in pursuance of and in the carrying out of said project the United States Government, and James W. Good, Secretary of War; Maj. Gen. Edgar Jadwin, Chief of En

gineers, and the Mississippi River Commission, and Maj. John C. H. Lee, pretending to be acting under authority of an act of Congress of the United States, adopted and approved on May 15, 1928, are preparing to construct a certain floodway or diversion channel, designated under the adopted project as the Boeuf Floodway or Diversion Channel. The purpose of this floodway or diversion channel is to divert water from the main channel of the Mississippi River into the basin of this floodway and to use this basin as a diversion channel to lower the level of the water in the Mississippi River and to carry it through this diversion channel to some other point. That this diversion channel or floodway was not intended in any way for the benefit of the property owners in the floodway or diversion channel. On the contrary, property situated in the area of this diversion channel or floodway would be destroyed or rendered valueless.

The Bill further alleged that

"Sec. 4 of the flood control act of May 15, 1928, provides as follows:

'Sec. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River * * *'

The Bill in substance further states:

"The water that will flow into the Boeuf Floodway or Diversion Channel will all be diverted from the main channel of the Mississippi River. The main levee of the Mississippi River at this point will be retained, but will be raised above and below so that, at this point, it will be lower than the levee

above and below, and will constitute what Major General Jadwin terms in his report a fuze-plug levee, and is solely for the purpose of having the water break over same at flood tide and flood this diversion channel or floodway. In other words, it is an uncontrolled spillway. Guide levees are to be constructed on each side of this basin. The width of the basin between the guide levees will be from approximately eight to eighteen miles, extending from Cypress Creek to the back water pool above the mouth of Red River. The construction of these guide levees will have the effect of making a floodway or pocket for the flow of water intentionally diverted from the Mississippi River through this diversion channel, and this diverted water will have the effect of destroying the value of all property situated within this area. The project adopted by Congress in the flood control act of May 15, 1928, specifically set apart this diversion channel or floodway as a part of the project, and, as stated above, the said agents of the Government are now proceeding to construct the guide levees, so as to enclose this diversion channel and specifically define its boundaries and is designedly making this area a floodway or diversion channel. The Government, through its agents, the Secretary of War, Major General Jadwin, and the Mississippi River Commission, has publicly announced, and it is a notorious fact, that the property in this diversion channel is to be used as a floodway; and the Secretary of War, acting through Major General Jadwin, Chief Engineer, is, at this time, advertising for and receiving bids for the construction of the guide levees to enclose this channel, which will have the effect of fixing the bounds of this diversion channel and floodway, and at floodwater it is intended, by the use of what the Government designates as fuze-plugs or low places in the main levee, to flood this entire channel so fixed and designated by them as such, the lands and properties located between the

guide levees to be the floor of the floodway or diversion channel.

"That the complainant owns and is in possession of land, with improvements thereon, which are located within the area or the bounds of this diversion channel or floodway. That the value of this land affected or to be taken for this diversion channel or floodway will approximate the sum of $9,000.00.

"That the above described lands lie within the area affected by said proposed plan and within the area which will be surrounded by the guide levees and the main river; that all of said lands are highly improved and are, at this time, being used for agricultural purposes; that there are located thereon complainant's residence and other valuable farm buildings; that, at this time, all of complainant's above-described lands lie back of the Mississippi River levee and are protected at all times from the waters of the Mississippi River, if the levees hold.

"That in the construction of said proposed guide levees all of complainant's above-described lands will be taken and used for floodway or diversion channel and will become a part of the floodway and diversion channel and be subject to overflow from the Mississippi River in time of flood, and, under the adopted project, it is intended that they shall be flooded; that said land will be rendered unfit for agricultural purposes or for any other purpose save that of serving as a part of a floodway or storage basin when the Mississippi River is at flood stage.

"That the defendants, Major General Jadwin, (who, since this suit was instituted, has died and been succeeded by Major General Brown), the Mississippi River Commission, and Major Lee, pretending to be acting under authority of an act of

Congress of the United States adopted and approved May 15, 1928, are proceeding with the work of constructing said proposed guide levees and other construction work incident thereto in the carrying out of the project adopted by Congress; that this will, in effect, be the taking by the United States Government of all of said above-described real estate belonging to said complainant for the purpose of carrying out said project without due process of law and without just compensation.

"That the War Department, acting through United States Engineers' Office, at this time is advertising for bids for the construction of these guide levees, and, unless restrained from doing so, bids will be received on June 17, 1929, and contracts let thereon in due course.

"That the overt acts of the defendants, Major General Jadwin, the Mississippi River Commission, and Major Lee, pretending to act under an act of Congress of May 15, 1928, in advertising for bids for the letting of contracts for the doing of said work in the construction of said guide levees, in proposing to award contracts for the construction of said proposed guide levees will mean the taking by the United States Government of complainant's lands and properties without due process of law and without just compensation."

Complainant further alleged, in substance, that the defendants in setting apart this property as a floodway and diversion channel and in advertising for and receiving bids for the doing of the proposed work, to-wit, the construction of the guide levees and the contemplated acts of the defendants in the awarding of contracts therefor, have already had the effect of casting a cloud upon the title of complainant to his said lands and properties and have materially affected his use and enjoyment of same and

have materially affected and impaired the value thereof. That, as the result of setting apart this area as a floodway or diversion channel and the publication by defendants of said advertisement, complainant's property has not only deteriorated in value but complainant's title to same has been seriously clouded, his use of same has been seriously affected, and complainant would be unable to borrow money on said lands, sell or dispose of same. That, as a result of making this area, in which complainant's lands and those of others are situated, a floodway or diversion channel, these lands will be rendered unfit for agricultural or any other purpose. That the additional destructive flood waters that will pass by reason of diversion from the main channel through this diversion channel will destroy complainant's property. That the defendants have not commenced any condemnation proceeding against complainant for this property, and no compensation has been paid him, or offered him, but that the defendants are seeking to award contracts for the immediate construction of guide levees and to make a diversion or floodway channel in this area without having obtained by condemnation or otherwise the property of complainant or flowage right over same.

Complainant further stated that his injury would be irreparable; that if contracts for the guide levees were awarded before complainant had been compensated for his property or secured in the payment of compensation for same, the contracts would involve such large sums that complainant would be unable to give bond sufficient to enjoin same and thus protect his property from confiscation by reason of the proposed unlawful acts of the defendants.

That complainant had no full, adequate and complete remedy at law.

The bill further alleged, in substance,

"The said act further provides, in section 4, that if condemnation proceedings are commenced to obtain properties which, in the opinion of the Secretary of War and the Chief of Engineers, are needed to carry out the project, the proceedings will be under the provisions of sections 5 and 6 of the river and harbor act of July 18, 1918. Section 5 of that act expressly provides that before the United States can acquire possession of property needed it shall first file its petition for condemnation, after which it shall have the right to take immediate possession of said lands and proceed with the public works thereon only upon the following conditions: 'That certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceeding shall be instituted.'

"The defendants herein are undertaking to take possession of complainant's property without first filing a condemnation suit or without first purchasing same from him. That the construction of the guide levees will, in effect, be taking possession of complainant's property by the United States Government without just compensation to complainant."

The bill, in substance, was for the purpose of enjoining the parties named from taking or attempting to take the land of respondent or using the same for flowage rights without first either condemning the land or flowage rights thereover or purchasing same. (R. 1-8).

The defendants in the District Court moved to dismiss the bill on the grounds, among others, (1) that the action was one against the United States, (2) that the court was without jurisdiction, (3) that the bill disclosed no ground for equitable relief, and (4) that the bill disclosed no cause of action. (R. 8-9). The District Court, construing the bill as charging that the petitioners were proceeding in violation of both the Flood Control Act and the Constitution, held that the United States could not or need not be a party, and that it should be dismissed as a party. (R. 10-15). The court overruled the motion to dismiss the suit on the ground that the Flood Control Act required the United States to condemn or acquire flowage rights over the respondent's property before going ahead with the flood-control project in the Boeuf Basin. (R. 15-27).

Thereupon the petitioners answered the bill, putting in issue its material allegations. (R. 27-29).

The United States District Judge handed down two written opinions in the cause, said opinions setting forth fully all the facts and citing fully the authorities upon which the Court based its opinion. These opinions were adopted by the Circuit Court of Appeals for the Fifth Circuit as the opinion of that Court, and it is from the decision of the Circuit Court of Appeals that the petitioners have perfected their writ of certiorari to this Court.

The opinion of the District Court rendered upon the overruling of the defendants' motion to dismiss the bill of complaint (R. 10-29) is reported in *37 F. (2d) 235*. The opinion of the District Court upon the merits (R. 117-125)

is reported in *37 F. (2d) 602.* The opinion of the Circuit Court of Appeals, adopting the opinions of the District Court (R. 132), is reported in *49 F. (2d) 768.*

After trial upon its merits, the Court below found that complainant's property was situated within the boundaries of the proposed Boeuf Diversion Channel; that the construction of the guide levees in accordance with the adopted plan would have the effect of taking complainant's property for public use; that the carrying out of the adopted plan as to the Boeuf Diversion Channel would cause complainant's property to be overflowed and practically destroyed; that the Government had not condemned complainant's property for use as a part of the Boeuf Diversion Channel and had not obtained flowage rights over same, and that, if said guide levees were permitted to be constructed in advance of condemnation proceedings or the purchase of the property, it would in effect be the taking of complainant's property for public use without just compensation, in violation of the Fifth Amendment to the Constitution of the United States and also in violation of Section Four of the Flood Control Act of May 15, 1928. (See Court's opinion R. 108-115).

The Court thereupon enjoined all of the defendants, except the United States, "from proceeding with the construction authorized by or carrying out the plan adopted by the Act of Congress, approved May 15, 1928, known as the Mississippi River Flood Control Act, in the Boeuf Basin Floodway, including all levee work or levee construction and the awarding and letting of contracts for the same, unless and until the property of the said complainant has been acquired by the United States Government or the flow-

age rights over same acquired either by purchase or condemnation for such purpose." (See printed Record, 120-121).

The defendants appealed from this decree to the Circuit Court of Appeals, Fifth Circuit, which Court affirmed the decision of the District Court without written opinion but, as stated, "for reasons stated in opinions rendered by the District Judge." (R. 132).

From this judgment, this Court granted certiorari.

The following facts are uncontradicted:

That on May 15, 1928 the Congress of the United States enacted an act for the control of floods on the Mississippi River and its tributaries, and for other purposes, this act being Public Document No. 391, 70th Congress.

That this Act adopted a project for flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, 70th Congress, first session.

That said Act provided for the appointment of a board to consist of the Chief of Engineers, the President of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate * * * and that such board was authorized and directed to con-

sider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927; that this board did consider the engineering differences and adopted the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and this report was duly approved by the President of the United States in conformity with the Act.

That in the report of the Chief of Engineers, Major General Jadwin, submitting his plan to the Secretary of War, expressly stated that the "plan fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity and sends the surplus water through lateral floodways". Its essential features and their functions are:

> "Floodways from Cairo to New Madrid, from the Arkansas River through the Tensas Basin to the Red River, and from the Red through the Atchafalaya Basin to the Gulf of Mexico." (See House Document No. 90, 70th. Congress, 1st Session, Page 3).

The report expressly stated that these lateral floodways would relieve the main channel of the water it can not carry and lower the floods to stages at which the levees can carry them. (P. 3-4).

That said report further states:

> "The project recommended gives the maximum of results for the minimum of cost. It recognizes the interests and protects the rights of those who will be chiefly benefited and of the taxpayers

who furnish the funds. Complete flood control, embodying the cheapest practicable reservoir system, would be much more expensive." (P. 4).

"The plan heretofore pursued has been the construction of levees high enough and strong enough to confine all of the flood waters within the river channels. The levees that have been constructed are not sufficiently high for such floods as are now predicted. The cost of raising and strengthening them sufficiently to carry extreme floods would greatly exceed the cost of the plan proposed. Furthermore, the extent of the disaster which follows a crevasse increases greatly as the flood is forced to higher stages by confinement wholly within the levee system. The loss of life and property in the recent great flood in the alluvial valley followed the breaking of the levees which reclaimed the land for the use of man. This reclamation had been pushed so far that insufficient room was left in the river for the passage of the unprecedented volume of flood water. The levees must be strengthened but a halt must be called on further material increase in the heights and the consequent threat to the inhabitants of the areas they are built to protect." (P. 4).

"Man must not try to restrict the Mississippi River too much in extreme floods. The river will break any plan which does this. It must have the room it needs, and to accord with its nature must have the extra room laterally. In its original state the river had only one low water channel until it reached the flat land near the Gulf, but in flood it overflowed an area 50 miles wide, which is really its natural flood bed. The water which can not be carried in the main channel with the levee at reasonable height must be diverted and carried laterally. Some additional capacity can be obtained in the main river by local setbacks of the levees. As a

general setback is not practicable, the remainder must be supplied by floodways paralleling the general course of the river." (P. 4).

"The plan recommended provides the requisite space for the passage of floods, and levees of adequate strength to withstand them, so that should a flood recur of the magnitude of the flood just experienced, the maximum of record, it would be passed out to the Gulf without danger to life in the alluvial valley, and without damage to property except in the floodways allotted for its passage. Controlling side levees limit the area of the floodways, and protect land not in the floodways where such protection justifies its cost." (P. 4-5).

It is undisputed that said report also states:

"The main features of the plan recommended are illustrated on one of the accompanying maps. The portion of the alluvial valley from Cape Girardeau, the northern limit of the alluvial valley, to Cairo, can be protected by a slight increase in the size of the levees. The serious problem begins at Cairo at the confluence of the Ohio and the Mississippi. From here to New Madrid the main levee on the west bank chokes the river unduly and should be set back sufficiently to lower the head of water at Cairo by 6 feet in an extreme flood. The existing river-bank levee will be retained but lowered 5 feet. The floodway between the new and the old levees will be capable of cultivation at all times excepting in floods greater than that of 1922. (P. 6).

"From the mouth of the Arkansas to the Old River, at the mouth of the Red, extreme floods can not be carried between levees of the Mississippi without dangerous increase in their heights. A floodway for excess floods is provided down the Boeuf River, on the west side of the river. Excess water can not be carried through the section on the

east side, since it would be forced back into the main river by the highlands on the east bank below Vicksburg and have to be carried thence for 100 miles between the main river levees to the mouth of the Red River. The entrance to the floodway is closed by a safety plug section of the levee, at present grade, which is located at Cypress Creek, near the mouth of the Arkansas. To insure their safety until this section opens, the levees of the Mississippi, from the Arkansas to the Red, will be raised about 3 feet. To prevent flood waters from entering the Tensas Basin, except into the floodway during high floods, the levees on the south side of the Arkansas will be strengthened and raised about 3 feet as far upstream as necessary." (P. 6).

It is undisputed that said report further states that "at the City of New Orleans, an increase in levee height is considered unsafe, aside from the great cost of raising the levees and the wharves built upon them. To afford proper protection to New Orleans, with its population of nearly half a million and property value of over a billion dollars, a special floodway upstream from the city is essential. The most practicable location is on the east side of the river, discharging into Lake Pontchartrain. A controlled spillway at Bonnet Carre will limit the discharge through this floodway to that necessary for the protection of the City." (P. 6-7).

These engineering plans were adopted as a part of the Flood Control project and written into the law.

It will be seen from reading this report of the Chief of Engineers that it provides for the abandonment of levees only as a means of lowering the water in the Mississippi River, such a project having proved a failure; that in lieu

thereof he adopts a plan providing for the water in the Mississippi River being lowered during flood time by a series of **DIVERSION CHANNELS**, the purpose of such channels being to take the water from the Mississippi River and divert it through these channels to other places. The first of these diversion channels is known as the Birds Point-New Madrid Diversion Channel. This diversion channel is on the west bank of the River, opposite the City of Cairo, Ill., and its sole and only purpose is to protect the City of Cairo. This diversion channel provides for a setback levee and the lowering of the main levee. The water diverted through this diversion channel leaves the River through this channel, which is opposite the City of Cairo, but is brought back into the Mississippi River again at a distance of about seventy miles from Cairo. This water is only taken from the Mississippi River temporarily. There is no controlled spillway governing the diversion of this water from the Mississippi River into the basin designated and fixed by the setback levee, but a section of the old levee is constructed lower for a certain distance, or as it is called, a fuse plug section is made that goes out only when topped by the water.

Before considering the Boeuf Diversion Channel, we call attention to the other diversion channel, known as the Bonnet Carre Spillway. This diversion channel is about 30 miles above the City of New Orleans and is operated by a controlled spillway, which will be made to function when the water reaches 20 feet at the Carrollton gauge at New Orleans. The purpose of this controlled spillway is for the benefit of the City of New Orleans alone, just as the Birds Point-New Madrid Spillway is for the benefit of the City of Cairo alone. This diversion

channel is constructed with guide levees from the main river to Lake Pontchartrain and is nothing more than an artificial canal with a controlled spillway and is expected, when functioning at its full capacity, to carry 250,000 second feet of water. No flood waters have gone through this area since strong levees were built in 1882.

The third diversion channel provided in the adopted plan is the floodway in the Boeuf Basin. The Boeuf Floodway is intended for the benefit of the entire valley from Cape Girardeau, Missouri, to the Head of Passes, and for both sides of the River.

This Boeuf Floodway, or diversion channel, is to be created by the raising and strengthening of the levees along the entire river, excepting a section some thirty-five miles in length at the head of the Boeuf Basin, the adopted plan specifying that such section shall remain some three feet lower and much weaker than the levees protecting lands along other stretches of the river. This thirty-five mile section is designated a "fuse-plug". The fuse-plug will automatically commence to function when the water in the Mississippi River reaches a stage of 60½ feet on the gauge at Arkansas City, Arkansas. At this stage, water will begin to flow over the fuse-plug section, as is intended. It is contemplated that this will cause a crevasse through the fuse-plug levee, which may gradually widen to include the whole thirty-five miles, if the condition of the main river requires. The former Chief of Engineers, Major General Edgar Jadwin, designer of the project, stated in his examination before the Flood Control Committee of the House of Representatives of the United States that the soil of this piece of fuse-plug levee would give way and fail if the

plan worked, and that he had no doubt that this fuse-plug section would fail. **When asked the question, if this fuse-plug section would fail, he answered: "Yes, sir, I have no doubt of it at all, we would look at the materials to be sure that the section was such that a break would occur, but in a long length like that we are almost certain to find the material suitable. If we do not, we would have to put something in there with a little sand mixed in with it." (See testimony of Major General Edgar Jadwin before House Flood Control Committee, 70th Congress, 1st Session, Volume 6, page 4111 of Report of Committee Hearings).**

The guide levees are to be constructed from the ends of this fuse-plug section down through the Boeuf Basin and the water carried between these guide levees into the Atchafalaya Basin and thence to the Gulf of Mexico. The greatest volume of water that has ever passed through the Boeuf Basin was in 1927, when approximately 450,000 second feet was carried through this Basin, none of which, however, was from the Mississippi River.

The adopted plan proposes to divert through this fuse-plug section and into the Boeuf Basin a maximum of 1,250,000 second feet of water which will be carried between the guide levees, constructed for that purpose in the Boeuf Basin, to the head of the Atchafalaya River. Such a diversion means 800,000 second feet more water than has ever before passed through the Boeuf Basin **from all sources.** This entire additional 800,000 second feet would be diverted from the main channel of the Mississippi River and would undeniably constitute "additional destructive flood water." **(See R. 35, 43, 44, 64, 65, 78, 81, 83, 92, 103).**

It is uncontradicted that the Government is raising the main levees on the west bank, in accordance with the plan, 3 feet; and is leaving a fuse-plug section much lower than the levees above and below, and have made plans for and advertised for bids for the construction of guide levees in this Boeuf Basin. (See stipulation, R. 29).

It is uncontradicted that respondent's property lies within this diversion channel and that petitioners have made no effort to condemn his property for use as a part of the diversion channel or to obtain flowage rights over same, but are actively proceeding to have said guide levees constructed in accordance with the plan and for the purpose provided in the plan.

It is uncontradicted that, with the fuse-plug section left lower than the other sections of the main levee and the construction of the guide levees, the Government will not be required to do anything further to divert the additional destructive flood waters from the main Mississippi River through this diversion channel. (See Jacobs testimony, R. 64).

It is uncontradicted that the Government requires this diversion channel for the purpose of carrying out the plan.

It is uncontradicted that without this diversion channel the plan would not accomplish its purpose, as the other two diversion channels would not divert sufficient water from the main river during major floods.

It is uncontradicted that so far as this record shows, although counsel for petitioners has argued otherwise, the

Secretary of War and the Chief of Engineers have specifically set apart the property in the Boeuf Diversion Channel, in accordance with the plan, and are attempting to utilize same, in accordance with the adopted project, and that Kincaid's property is located in this diversion channel. (See stipulation, R. 29—Dean, R. 81-82-85-86; Graves, R. 92).

It is uncontradicted that the complainant below (respondent herein) is not seeking to enjoin the Government in any wise from condemning his property. He is not attacking the adopted project in any way, but is merely asking that his property either be condemned or acquired by purchase before it becomes a part of the diversion channel. (Stipulation, R. 29—Complainant's Bill R. 1-8).

It can not be disputed that, with the construction of the guide levees and the fixing of the bounds of the designated diversion channel in the Boeuf, this channel becomes federalized, becomes Government property; **and that under Section 9 of the Flood Control Bill the provisions of Sections 13, 14, 16 and 17 of the River and Harbor Act of March 3, 1899, are made applicable to same, and any obstruction or interference with this diversion channel could be punished by fine and imprisonment under the sections above quoted. (See Sec. 9 of Senate Bill 3740, 70th Congress, known as Flood Control Act of May 15, 1928).**

It is undisputed that in the report of the Chief of Engineers he expressly asked that this provision be written into the law and that the penalties and procedure applicable to violations of the laws for the protection and preservation of the navigable waters of the United States, enacted

in sections 12 and 17 of the River and Harbor Act of March 3, 1899, shall apply to violations of the above provision of law, and it is undisputed that all of these facts, all of these conditions and all of this law existed at the time the respondent instituted this suit. (See House Document No. 90, 70th Congress, 1st Session, P. 34-35).

It was stipulated between parties, complainant and defendant, in the Court below that it is admitted that the United States had advertised for and received bids for the construction of certain parts of the work to be performed in the Boeuf Basin in carrying out the terms of the adopted project given in the act approved May 15, 1928. (R. 29).

It was further stipulated that the relief asked by the complainant in this case is and shall be confined solely to the construction in the Boeuf Basin within the district of the court where the suit is pending, and that no attack is made upon the adopted plan as such. (R. 29).

The uncontradicted evidence shows that Kincaid, complainant below, owns certain land valued at $9,000.00, and that this land is located within the Boeuf Diversion Channel and between the boundaries of the guide levees. (See Kincaid's testimony, R. 30—Kemper's testimony, R. 33).

It is not disputed that the Government has made no effort to obtain Kincaid's property to be used as part of the diversion channel or to obtain flowage rights over same either by condemnation or purchase.

The fact that Kincaid's property is located within the jurisdiction of the United States District Court for the Western District of Louisiana is not disputed.

The petitioner herein has correctly set forth his assignments of error, and they will not be repeated in this brief.

JURISDICTION.

The District Court had jurisdiction in this cause by reason of the fact that it is a suit of a civil nature, at common law or in equity, and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and it is a suit arising under the Constitution or laws of the United States. *Judicial Code, Sections 24 (1) 24 (20); 264,* and *U. S. Code, Section 378.*

The Court had jurisdiction by virtue of *Judicial Code, Section 24. (20),* granting to United States District Courts jurisdiction, as set forth in *2 Mason's Code, 1972 and 1992,* which reads as follows:

> "The District Courts shall have original jurisdiction as follows: Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000.00 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, * * * ",

and by virtue of *Judicial Code, Section 264*, and *U. S. Code, Section 378*, which provides as follows:

> **"Writs of injunction may be granted * * * by any Judge of a District Court in cases where they might be granted by such court."**

This is a suit in equity wherein complainant seeks to restrain the defendants from the performance of certain acts which, if done, would be violative of the Fifth Amendment of the Constitution of the United States.

The case, therefore, arises under the Constitution of the United States.

Furthermore, the case arises under the laws of the United States, in that it involves the acts of officers of the United States purporting to act under an Act of Congress entitled, "An Act for the Control of Floods on the Mississippi River and its Tributaries, and for Other Purposes", approved May 15, 1928 (Public Document No. 391, 70th Congress, Senate Bill 3740, hereinafter referred to as the Flood Control Act), and an Act of Congress entitled, "An Act Making Appropriations for the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes", approved July 18, 1918 (Public Document No. 200, 65th Congress, House of Representatives 10069, hereinafter referred to as the Rivers and Harbors Act).

The verified bill of complaint avers that complainant's lands are about to be taken by defendants, and that the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs. The case, therefore, arises under the laws of the United States, and involves claims

founded upon the Constitution and certain acts of Congress in sums sufficient to meet federal jurisdictional requirements. In such a case, the jurisdiction of this Court cannot be questioned.

(Thornton v. Road Improvement District No. 1 of Clark County, Arkansas, 291 Fed. 518; Blevins v. Hines, 264 Fed. 1005; City of Toledo v. Toledo Rys. & Light Co., 259 Fed. 450; Ashland Electric Power & Light Co. v. City of Ashland, 217 Fed. 158; Portland Railway, Light & Power Co. v. City of Portland, 210 Fed. 667; Wilmington City Ry. Co. v. Taylor, 198 Fed. 159; Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 41 Sup. Ct. 243, 65 L. Ed. 577).

This is also a suit of a local nature involving the title to land located within the jurisdiction of the court and of a value exceeding, exclusive of interest and costs, the sum or value of $3,000.00.

Respondent will first present to the court its brief and argument and authorities in support of its contentions before replying to the brief of the petitioners herein.

ARGUMENT.

I.

In this case the United States Government, under the Flood Control Act of May 15, 1928, adopted a plan or project for the control of floods in the alluvial valley of the Mississippi River. A part of this plan calls for the construction in the Boeuf Basin of a diversion channel enclosed with guide levees, which guide levees are tied on

to the main levees of the Mississippi, and, at a certain flood stage, a fuse-plug section of the Mississippi River levee functions, and water is diverted from the Mississippi River through this diversion channel.

The respondent's property is located within the boundaries of this diversion channel and will be surrounded by guide levees. Respondent (complainant below) in this suit seeks to restrain the defendants below from exercising any acts relative to the appropriation of his land located within this designated diversion channel until the defendants below either condemn his property for this purpose or obtain flowage rights over same. Under the Flood Control Act the execution of the project involved is left to the Mississippi River Commission, under the direction of the Secretary of War and under the supervision of the Chief of Engineers. These agencies authorized to carry out the work of the flood control program are all joined as parties defendant.

The complainant alleges, and it is established by proof, that these agencies are unlawfully, arbitrarily, and without authority, undertaking to carry out certain provisions of the flood control project as adopted, and respondent is enjoining these unlawful acts and arbitrary actions insofar as they affect his property.

It is a well established principle of law that, in cases of this nature, where property is sought to be taken for public use without just compensation by public officials, injunction is the proper remedy, and in cases of this nature, the courts say:

"Injunctions are not controlled by the principles which regulate injunctive relief against ordi-

nary trespasses. The constitutional guaranty that property shall not be taken for public use without just compensation by agents of the state to whom this power is delegated, is deemed to establish a right of so high and sacred a character that any threatened infringement of the right should be restrained, without consideration of the adequacy of the legal remedy. The power is so capable of abuse, and those who are invested with it are often so prone to its arbitrary and oppressive exercise, that a court of equity, without inquiring whether there is irreparable injury, or injury not susceptible of adequate redress by legal remedies, will intervene for the protection of the owner." * * *

(Lewis, Em. Dom. S. 632; Pom. Eq. Rem. S. 465 and quotations; East and W. R. Co. of Alabama v. E. T. V. & G. R. Co., 75 Ala. 280; D. M. Osborne & Co. v. Mo. Pac. R. Co., 147 U. S. 248, 13 Sup. Ct. 299, 37 L. ed. 155; Bass v. Metropolitan W. S. El. R. Co., 82 Fed. 857, 27 C. C. A. 147, 39 L. R. A. 711; Bolton v. McShane, 67 Iowa 207, 25 N. W. 135).

United States Courts have also held:

"When the defendant has an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition is within the power of the defendant, injunction will almost universally be granted until the condition is complied with. This principle lies at the foundation of the multitude of cases which have restrained the taking of property until after the payment of compensation, for in all those cases the legislature has placed at the command of the defendant means for ascertaining the value of the property. In those cases the courts have seldom stopped to inquire whether the value of the property sought to be taken was little or great, whether the injury to the complainant was large or small,

but have contented themselves with holding that as the defendant had full means for ascertaining such compensation, it was his first duty to use such means, determine and pay the compensation, and until he did so the taking of the property would be enjoined."

(M'Elroy v. Kansas City, 21st Federal Reporter, 261; Bass v. Metropolitan West Side El. R. R. Co., 82nd Federal Reporter, 857).

The respondent herein has no remedy against what in legal effect amounts to a taking of his property without just compensation, except by injunction. Federal courts recognize and employ that remedy.

In *Pine v. Mayor of the City of New York, 103 Fed. 337*, there was under consideration by the Court the question of the right of the City of New York to divert water for the city's use. Pertinent to the point here, the Court said (P. 339):

"The unauthorized and uncompensated permanent diversion by a municipal corporation of the water of a non-navigable stream from a riparian owner is not excused by the fact that it was deemed to have been taken for a public benefit. The seizure and permanent diversion is a continuing wrong, unless compensation has been made either by agreement or under process of law and by virtue of authority conferred by the Constitution and the statutes of the state. * * *

"An injunction to prevent a permanent and unauthorized seizure and diversion of running water is a proper and is the effectual remedy, because the remedy by an action at law provides only for the damages which had accrued before suit, and compels a multiplicity of suits. It is the only efficient remedy for complete relief. * * *

"The equitable remedy by injunction exists and is to be exercised in the absence of any legislative authority for the infliction of the permanent injury, although the pecuniary damage to the riparian proprietor is not of large amount. The fact of no serious pecuniary damage is not a hindrance to the right of the riparian proprietor to the restoration of the water to its natural course. * * *

"If a court of equity has power in any case by decree to ascertain and order the payment of damages by decree of injunction in the alternative, a court of equity will not exercise such power where the defendant has committed a permanent injury without authority of law and without pretense of right to take and retain the property. * * * But a court of equity can properly delay the issuance of an order of injunction to allow the defendants an opportunity to agree with complainants in regard to adequacy of compensation."

In a long line of decisions, federal courts have held that injunction is the proper remedy where an illegal effort is made to take possession of complainant's land.

St. Louis & San Francisco R. Co. v. City of Tulsa, 213 Fed. 87.

Ashland Elec. Power & Light Co. v. City of Ashland, 217 Fed. 158.

City of Toledo v. Toledo Rys. & Light Co., 259 Fed. 450.

Thornton v. Road Imp. Dist. No. 1 of Clark Co., Ark., 291 Fed. 518.

Wilmington City Ry. Co. v. Taylor, 198 Fed. 159.

If the petitioners herein were permitted to construct the guide levees in the Boeuf Basin in accordance with the

adopted project, plaintiff's land would be enclosed in this diversion channel. No further action would have to be taken to obtain the possession of respondent's property, and no further action would have to be taken by the Government or its agencies to turn water through this diversion channel and destroy this property. No further action would have to be taken by the Government to make respondent's property a part of the diversion channel, and this would, in effect, be taking respondent's property without due process of law and without just compensation.

That the petitioners would have to take no further action other than the construction of the guide levees in the Boeuf Basin, in order to create this diversion channel within its bounds is established by evidence of Harry Jacobs (R. 64), and admitted by all witnesses for the defendants below.

II.

FEDERAL COURTS HAVE THE POWER TO RESTRAIN UNLAWFUL, ARBITRARY AND UNWARRANTED ACTS OF FEDERAL OFFICERS.

Respondent seeks to restrain the petitioners from exercising any further unlawful acts leading to the taking of his land for public use without just compensation and without first fully complying with the express terms of the Flood Control Act of May 15, 1928. Under the Flood Control Act the execution of the adopted project is left to the Mississippi River Commission under the direction of the Secretary of War and under the supervision of the Chief of Engineers. These agencies are expressly directed how to obtain these rights by condemnation or pur-

chase or donation. These agencies have failed to exercise this authority in a lawful manner as provided in Section 4 of the Flood Control Act. In fact they are attempting to take respondent's land without his consent and without just compensation. These agencies authorized to carry out the work of the flood control program are all joined as parties defendant. When Congress delegates to a federal agency the right to acquire property for public use, such federal agency can not go beyond the limit of the power thus given. Such federal agent must not only limit his activities so as to come within the terms of the act delegating such power, but also in such way as not to violate the Constitution of the United States. *(Alabama Power Co. v. Gulf Power Co., 203 Fed. 606).* If such federal agent, in the performance of his prescribed duties, takes such steps as result in the invasion of the rights of others, he can be restrained by the judiciary. *(Goltra v. Weeks, 46 Sup. Ct. 613; Philadelphia Co. v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570; Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126).*

The point was discussed by Justice Hughes in *Philadelphia Co. v. Stimson, 223 U. S. 605,* as follows:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. **(Little v. Barreme, 2 Cranch. 170 [2 L. Ed. 243]; United States v. Lee, 106 U. S. 196, 220, 221 [1 S. Ct. 240, 27 L. Ed. 171]; Belknap v. Schild, 161 U. S. 10, 18 [16 S. Ct. 443, 40 L. Ed. 599]; Tindall**

v. Wesley, 167 U. S. 204 [17 S. Ct. 770, 42 L. Ed. 137]; Scranton v. Wheeler, 179 U. S. 141, 152 [21 S. Ct. 48, 45 L. Ed. 126]).”

Not only will courts restrain federal officers from further performance of certain acts upon which they are engaged, but injunction will be employed to restrain such officers from the performance of acts which they are threatening to engage upon, where it appears that, in the performance of such acts, they are exceeding their authority to the injury to the party complaining. ***(Philadelphia Co. v. Stimson, 223 U. S. 605; Noble v. Union River Logging R. R. Co., 147 U. S. 165, l. c. 171-172, 13 S. Ct. 271, 37 L. Ed. 123).***

And in such a case, a Federal Officer will not be heard to complain that he is immune from injunctive process on the ground that he is an official of the United States. *(Philadelphia Co. v. Stimson, supra; School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90; Lane v. Watts, 234 U. S. 525; United States v. Lee, 106 U. S. 196).*

Complainant here stands upon the same position as complainant in *Philadelphia Co. v. Stimson*, where the Court said:

> **“The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly * * *”.**

Complainant does not here charge that defendants are not empowered to carry into execution the project

adopted by the Flood Control Act. He charges that they are about to exceed the power conferred by that Act.

III.

FIFTH AMENDMENT.

The object of this proceeding is not to attack the adopted Flood Control Project. The complaint is not directed against the law itself, but is directed against the unlawful and arbitrary manner in which the Mississippi River Commission and others are undertaking to carry out the work; their utter disregard of what we claim to be the plain letter of the law, and to set aside their *ipse dixit* interpretation by which they have arrived at the conclusion that they alone are the judges and interpreters of the Fifth Amendment to the Constitution of the United States and of the application of Section 4 of the Flood Control Act.

The questions in this case are:

First. In the carrying out of the adopted Flood Control Plan as to the Boeuf Diversion Channel in the manner in which the engineers propose to carry it out, by the construction and, especially by the construction of guide levees, fixing the bounds of said channel by such guide levees and enclosing the property of respondent between these guide levees and in the diversion channel, making complainant's land a part of a federal project without having acquired the right to do so by condemnation, purchase or donation, will be a taking of respondent's property without due process of law and without just compensation for public use, and this respondent is entitled to the pro-

tection of the Fifth Amendment to the Constitution of the United States.

Second. The further question as set forth in the bill of complaint and which has been established by proof, without any serious contradiction, that as the result of the construction of these guide levees in the Boeuf Diversion Channel, served by the fuse-plug section of levee on the main river, and as a direct and designed result of the adopted Flood Control Plan, additional destructive flood waters will pass over and upon complainant's property by reason of diversion from the main channel of the Mississippi River and result in the destruction of respondent's property.

The object of this proceeding is not to attack the Flood Control Act, or what is commonly known as the Jadwin Plan. The complaint is against the attempt of the engineering officers of the Mississippi River Commission and the engineering officers of the Government to carry out the plan under the supposed power of the Government in a manner which is deemed, by this complainant and other sufferers, unlawful, unwarranted and arbitrary.

Nothing in this record has to do with the feasibility or non-feasibility of the engineering plan as a plan. The whole case, however, seeks protection against the direct consequences of the plan in so far as it affects the Bouef Basin. **The precise question is:**

> by the carrying out of the plan in the manner and form in which the Government proposes to carry it out in the Bouef Basin there is a taking of property without due process of law and that this com-

plainant is entitled to the protection of the Fifth Amendment.

No one disputes the constitutionality of the Flood Control Act. No one questions the right of Congress to delegate the execution of that work to an authority of its own choice. No one questions the right of that authority to proceed with the work, but this case exacts that the work be proceeded with in a lawful manner, and that private property taken must be compensated for in the manner and form provided by law and protected by the Fifth Amendment.

The facts of the case have been set forth at length. It suffices to say, for the purposes of the application of the law, that we should but draw a picture of levees enclosing a basin, and these levees being so constructed that they are to break and inundate this basin.

There is no question of any claim resulting from the construction of levees as such. There is no denial of the right of the Government to construct standard levees or adequate levees at this or other points.

The denial is to the right to construct what are known as guide levees, levees which will fix by design the Boeuf Diversion channel, provided for in the adopted plan, and which diversion channel will include respondent's land between the bounds of this designed channel. Waters from the main channel of the Mississppi will be designedly diverted into and through this diversion channel by what is termed a fuse plug section which automatically functions when the river reaches a certain stage. The purpose of this diversion channel is to protect other portions of the

territory through which the Mississippi River flows, and the territory outside of these guide levees. It is directed at the designed dedication of this and other property within these guide levees to be flooded in the interest of the public at large. It is the claim that the sword of Damocles has been intentionally, designedly hung over the heads of these individuals and that, as a result, when completed, there will be a real and actual taking within the meaning and intendment of the Constitution.

The case is of momentous importance, and perhaps seldom has this Court been called upon to decide any question involving the welfare of so many individuals as this court has in the present case. It is estimated that more than 70,000 people live within this Bouef Basin and their homes, farms, live stock are in this designed floodway. (Kemper testimony, R. 38). The area of the Bouef floodway is about 2250 square miles (see R. 87).

SUMMARY OF THE GENERAL LAW.

For the purposes of this argument, we must summarize for a moment the general law of this case.

Congress derives its power to enact legislation of this sort and to expend money for these purposes by authority of *paragraph 3, section 7, Article 1 of the Constitution of the United States*—the Commerce clause.

Legislation of this kind has been upheld by the Supreme Court of the United States, and congressional action has been justified strictly within the commerce clause.

United States v. Rio Grande Dam, 174 U. S. 690.
Cummins v. Miss. River Com., 241 U. S. 351.

There is no need to refer at length to what is known as the Flood Control Act. In the very nature of things it is clear that it was intended to take property of the individual for public use. The means of taking is expressly provided in the Act. That Congress recognized that there should be compensation is to be found in *Section 4*, which reads:

> "Sec. 4. The United States shall provide flowage rights for **additional** destructive floodwaters that will pass by reason of diversion from the main channel of the Mississippi River; provided, That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.
>
> The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States District Court for the District in which the land, easement, or right of way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights of way required for this project. The provisions of Section 5 and 6 of the River and Har-

bor Act of July 18th, 1918, are hereby made applicable to the acquisition of lands, easements, or rights of way needed for works of flood control:—Provided, that any land acquired under the provisions of this section shall be turned over without cost to the ownership of States or local interests."

It is also very clear that Congress did not intend that the people in these diversion channels should contribute anything to this project for the reason that they had already contributed approximately $292,000,000.00 in the past.

Section 2 of the Flood Control Act reads as follows:

"**Sec. 2.** That it is hereby declared to be the sense of Congress that the principle of local contribution toward the cost of flood-control work, which has been incorporated in all previous national legislation on the subject, is sound; as recognizing the special interest of the local population in its own protection, and as a means of preventing inordinate requests for unjustified items of work having no material national interest. As a full compliance with this principle, in view of the great expenditure estimated at approximately $292,000,000, heretofore made by the local interests in the alluvial valleys of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required."

By virtue of the Flood Control statute, the government is acting through the Mississippi River Commission. The Mississippi River Commission is an arm of the government created by an Act of Congress.

For the purpose of this argument at this time, we may eliminate Section 4 as being nothing more nor less than the possible recognition of additional liability by the government and something which might be added to the rights given under the Fifth Amendment if anything could be added; and also specifying the means those intrusted with the carrying out of the plan should adopt to obtain the property.

The case, therefore, before the court is this: The Government of the United States, acting through the Mississippi River Commission, is seeking to do an act—designedly created a diversion channel in an area within which the property of this complainant is located, and make respondent's land a part of the floor of this basin—without first obtaining respondent's lands by condemnation or otherwise.

The Mississippi River Commission claims that its authority arises from what is known as the Flood Control Act. The Flood Control Act was enacted by Congress under authority of the Commerce Clause of the Constitution.

Under the facts, does the Fifth Amendment intervene?

Let us analyze the situation as to the rights of the Government under the commerce clause.

Under the commerce clause, the Government has the right to delegate its authority to an agency. When the Government proceeds in that manner and through such an agency and by such authority, to-wit, the commerce clause, it stands in the same attitude as any citizen and its acts are subordinated to the Fifth Amendment. This question has definitely been disposed of.

In *United States v. Cress, 243 U. S. 716*, the Court, speaking through Mr. Justice Pitney, held:

> "Power of the federal government to improve navigable streams in the interest of interstate and foreign commerce must be exercised, when private property is taken, in subordination of the Fifth Amendment."

Quoting from *page 326*, we find:

> "* * * but the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment." (Quoting *Monongahela Navigation Co. v. U. S., 148 U. S. 312; United States v. Lynah, 188 U. S. 445*).

The *Monongahela* and *Lynah* cases above referred to by the Supreme Court will be discussed later on in support of the general proposition that there is a taking within the meaning and intendment of the Constitution.

It would seem clear, therefore, that there are two points on which there can be no dispute: *(a)* The statute under which this work is being done is an exercise by Congress of its power under the commerce clause of the Constitution of the United States; *(b)* When Congress seeks to

proceed under the Commerce clause its acts are in subordination of the Fifth Amendment.

This brings us to a discussion of the precise question, "Will the doing of the proposed act or acts be a 'taking' of respondent's property within the meaning and intendment of the Fifth Amendment?"

THE DEPRIVATION OF ITS USE, THE ELIMINATION OF ITS POSSIBILITIES, THE DEPRECIATION OF ITS VALUE RESULTING FROM BEING DEDICATED AND ENCLOSED IN A BASIN TO BE DESIGNEDLY FLOODED IS THE TAKING THAT WILL GIVE THIS COMPLAINANT THE PROTECTION OF THE FIFTH AMENDMENT.

After all is said and done, this case narrows down as to the view of what is property.

All the harm results from the petitioners' mistaken view of what is property. It is apparent that the petitioners' attitude is, and, in fact, the only possible leg it has on which to stand, is to assert that, as long as the owner remains clothed with a legal title and is not ousted from the physical possession at once despite the effect on present or prospective value, but with full knowledge that in due course it will be destroyed at some date by the means designed for this purpose by the engineers of the Government, there is no taking within the meaning and intendment of the Constitution.

The moment the petitioners leave that position, the moment they deny standing upon that position, then they

must admit that the question of what is a taking is a question of fact which is not to be measured by the yardstick of Army Engineers, but by the measure of justice of the judicial mind.

In *Ambler Realty Co. v. Village of Euclid, 207 Fed. 312*, we find an exhaustive opinion by District Judge Westerhaven on the question of what is property. Quoting from *page 313*, we find:

> "The argument supporting this ordinance proceeds, it seems to me, both on a mistaken view of what is property and what is police power. Property, generally speaking, defendant's counsel concede, is protected against a taking without compensation by the guarantees of the Ohio and United States Constitutions; but their views seem to be that, so long as the owner remains clothed with a legal title thereto and is not ousted from the physical possession thereof, his property is not taken, no matter to what extent his right to use it is invaded or destroyed or its present or prospective value is depreciated. This is an erroneous view. The right to the property, as used in the Constitution, has no such limited meaning.
>
> "As has often been said in substance by the Supreme Court, there can be no conception of property, aside from its control and use, and upon its use depends its value. See Cleveland, etc., R. R. v. Backus, 154 U. S. 139; Ranson v. Bush, 251 U. S. 182; Block v. Hirsch, 256 U. S. 185; Pennsylvania Co. v. Mahon, 260 U. S. 414; Buchanan v. Warley, 245 U. S. 74.
>
> "In 210 Ann. Cas. 1918, 1201, Mr. Justice Day, amplifying, says:
>
> 'Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of. The Consti-

tution protects these essential attributes of property.' (Cases cited). Property consists of the free use, enjoyment and disposal of a person's acquisition, without control or diminution, save by the law of the land."

This we think states the law of what is property.

Is this case embraced in these principles?

A review of the authorities will aid the Court in applying the facts of this case to the principles laid down in these various cases.

In *Richards v. Washington Terminal Co., 233 U. S. 546*, the Court had before it an action to recover for damage to property resulting from the maintenance of an alleged nuisance by defendant by means of the operation of a railroad and tunnel upon his land near to but not adjoining those of the plaintiff.

The Court held that this was a private nuisance and the party was relegated to compensation for such direct, peculiar and substantial damages as specially affected his property and diminished its value; and the Court said:

"Although in England, Parliament being omnipotent may authorize the taking of private property for public use without compensation, the English courts decline to place an unjust construction on its acts, and, unless so clear as not to admit of any other meaning, do not interpret them as interfering with the rights of private property.

"Legislation of Congress is different from that of Parliament, as it must be construed in the light of that provision of the Fifth Amendment which forbids the taking of private property for public use without compensation.

"While Congress may legalize, within the sphere of its jurisdiction, what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such character as to amount in effect to a taking of private property for public use."

Quoting further, at *page 557*, the Court said:

"Construing the acts of Congress in the light of the Fifth Amendment, they do not authorize the imposition or so direct any peculiar and substantial a burden upon plaintiff's property without compensation to him."

In *Peabody v. United States, 231 U. S. 531*, the Court had before it the determination of whether the establishment of a battery in connection with its military fortifications by the United States in the vicinity of claimant's land amounted, under the circumstances of this case, to a taking of property under the Fifth Amendment.

The Court, speaking through Mr. Justice Hughes, found that the case was without merit on the facts, inasmuch as guns had been fired on only two occasions; that this had taken place in the year 1902; that the suit had been filed in the year 1905, and that when the case was tried in 1910, it appeared that none of the guns had ever been fired for eight years; and further that there was no showing that the guns would ever be fired unless in necessary defense in time of war.

In denying the relief because of the condition of fact, and incidentally because of the fact that the govern-

ment in that case was proceeding under the general welfare clause, the Court said:

> "It may be assumed that if the government had installed its battery not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and sea to the right and privilege of the government to fire projectiles directly cross it for the purpose of practice or otherwise whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made. The subjection of the land to the burden of government use in this manner might well be considered to be a taking within the principles of the decision." (Quoting *Pumpelly v. Green Bay, 13 Wallace, 166; United States v. Welsh, 217 U. S. 330*).

And quoting further from the decision:

> "And not merely a consequential damage incident to a public undertaking, which must be borne without any right to compensation."

In *Gibson v. United States, 166 U. S. 269*, the question involved there was damage to property fronting on the Ohio River, and the Court declined relief on the grounds (quoting at *page 276*):

> "In short, the damage resulting from the prosecution of this improvement of a navigable highway for the public good was not the result of a taking of appellant's property and was merely incidental to the exercise of a servitude to which her property had always been subject."

In *Bedford v. United States, 192 U. S. 217*, the Court had before it a case where, by virtue of a cutoff and

the construction of revetment, the channel and current of the Mississippi River were gradually directed towards the land of the claimants situated about six miles below the cutoff, and that the current did erode and overflow twenty-three hundred acres of this land, which, at the time of the litigation, had continued.

The Court found against the complainant, but found "the object of the works was to preserve the condition made by natural causes," and held:

> "Damages to land by flooding as a result of revetments erected by the government along the banks of the Mississippi River, to prevent erosion of the banks from natural causes, are consequential and do not constitute a taking of the flood lands within the meaning of the Fifth Amendment."

The Court, at *page 225*, differentiated the case before it from the case of *Pumpelly v. Green Bay* and *United States v. Lynah* in these words:

> "In both cases, therefore, it was said that there was an actual invasion and appropriation of land, as distinguished from consequential damage. In the case at bar, the damage was strictly consequential. IT WAS THE RESULT OF THE ACTION OF THE RIVER THROUGH A COURSE OF YEARS. The case at bar, therefore, is distinguishable from the Lynah case in the cause and manner of the injury."

In *Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, (43 Sup. Ct. Rep. 158)*, the Court, speaking through Mr. Justice Holmes, dealing with the question of a taking, used these words:

> "The general rule at least is that, while property may be regulated to a certain extent, if regu-

lation goes too far, it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go, and, if they go beyond the general rule, if they do not stand as much upon tradition as upon principle. Bowdith v. Boston, 101 U. S. 16.

"In general, it is not plain that a man's misfortune or necessities will justify his shifting the damage to his neighbor's shoulders. Spade v. Lynn & Boston R. R. Co., 172 Mass. 488-489.

"We are in danger of forgetting that a strong desire to improve the public condition is not enough to warrant achieving the desired by a shorter cut than the constitutional way of paying for the change. As we have already said, this is a question of degree, and, therefore, cannot be disposed of by general proposition, but *we regard this as* going beyond any of the cases decided by this Court. The late decisions upon the law, as dealing with the congestions of Washington and New York caused by the war, dealt with laws intended to meet a temporary emergency, and providing for compensation determined to be reasonable by an impartial board. They went to the very verge of the law, but fell far short of the present act.

"We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain, but the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see the fact that this risk has become a danger warrants the giving to them of greater rights than they bought."

In the case of *United States v. Cress, 243 U. S. 316,* the Court, speaking through Mr. Justice Pitney, held, as

before stated, among other things, that when the government proceeded under the commerce clause, its power must be exercised, when private property is taken, in subordination to the Fifth Amendment. Striking at the merits of the case, however, we find almost an analagous case as the one at bar, and, quoting from *page 326*, we find:

> "And assuming that riparian owners, upon non-navigable tributaries of navigable streams, are subject to such inconveniences as may arise from the exercise of the common right of navigation, this in like manner must be limited to the natural right. The findings make it clear that the dams in question constructed by the government in the Cumberland and Kentucky Rivers, respectively, are for raising the level of those streams along certain stretches by means of backwater so as to render them to the extent of raising artificial canals instead of natural waterways. In the language of engineering, the government has 'canalized' the river. We intimate no doubt of the power of the United States to carry out this kind of improvement, nor do we doubt that, upon the completion of these improvements, these rivers—the Cumberland because it is an avenue of communication between two States; the Kentucky and also the Cumberland because in connection with the Ohio and Mississippi Rivers they furnish highways of commerce among many States remained navigable waters of the United States for all purposes of Federal jurisdiction, notwithstanding the artificial character of the improvements. But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment.
>
> "And we deem it clear that so much of the properties of the respective defendants in error as

was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks and dams in question was private property, and not subject to be overflowed without compensation in the raising of the level of the rivers by means of artificial dams."

In the case of the *Monongahela Navigation Co. v. United States, 148 U. S. 324, 326*, the Court said:

"It appears from the foregoing statement that the Monongahela Company had, under express authority from the State of Pennsylvania, expended large sums of money in improving the Monongahela River, by means of locks and dams; and that the particular lock and dam in controversy were built not only by virtue of this authority from the State of Pennsylvania, but also at the instance and suggestion of the United States. By means of these improvements, the Monongahela River, which theretofore was only navigable for boats of small tonnage, and at certain seasons of the year, now carries large steamboats at all seasons, and an extensive commerce by means thereof. The question presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. Obviously, this question, as all others which run along the line of the extent of the protection the individual had under the Constitution against the demands of the Government, is of importance; for in any society, the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the Government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet

the apprehension of many, that without some such declaration of rights the Government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.

"In the case of Sinnickson v. Johnson, 17 N.J.L. (2 Harr.), 129, 145, cited in the case of Pumpelly v. Green Bay Co., 13 Wall. 166, 178, it was said that 'this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.' And in Gardner v. Newburgh, 2 Johns. Ch., 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

"But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmation lying behind it in the Declaration of Independence, for, in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses. And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley, speaking for the court,

in Boyd v. United States, 116 U. S. 616, 635: 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*'

"The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being, 'Nor shall private property be taken for public use without just compensation.' The noun 'compensation', standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just'. There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal * * *."

In the case of *United States v. Lynah, 188 U. S. 445*, the Court said:

"It is clear from these authorities that where the government, by the construction of a dam or other public works, so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done, it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession, and the fee; and when the amount awarded as compensation is paid, the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the government and it becomes henceforth the full owner.

"Passing to the third question, it is contended that what was done by the government was done in improving the navigability of a navigable river, that it is given by the Constitution full control over such improvements, and that if, in doing any work therefor, injury results to riparian proprietors or others, it is an injury which is purely consequential, and for which the government is not liable. But if any one proposition can be considered as settled by the decisions of this court, it is that, although in the discharge of its duties, the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation.

"In Monongahela Navigation Co. v. United States, 148 U. S. 312, 336, it was said:

'But like the other powers granted to Congress by the Constitution, the power to regulate

commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation.'

"In that case, Congress had passed an act for condemning what was known as 'the upper lock and dam of the Monongahela Navigation Company,' and provided 'that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls should not be considered or estimated', but we held that this proviso was beyond the power of Congress; that it could not appropriate the property of the navigation company without paying its full value, and that a part of that value consisted in the franchise to take tolls. So in the recent case of Scranton v. Wheeler, 179 U. S. 141, 153, we repeated the proposition in these words:

"'Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution; and, of course, in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use.'"

In *Pumpelly v. Green Bay Co., 13 Wall. 166*, plaintiff brought a suit in trespass for damages caused by the defendant erecting a dam across Fox River, the northern outlet of Lake Winnebago, as a result of which 640 acres of land belonging to plaintiff were overflowed. The defend-

ant pleaded an act of the State of Wisconsin by which he and his ancestors were authorized to build the dam in question. Defendant also pleaded the provisions of the ordinance of 1787, under which it was declared that the navigable waters leading into the Mississippi and St. Lawrence should be common highways and forever free; that the dam constructed was constructed for the purpose of improving the navigability of the Fox and Wisconsin Rivers, and that the work was done under lawful authority from the United States and the State of Wisconsin. Defendant contended that there was no taking and that if any damage resulted, defendant should not be held therefor, because its acts were authorized by state and federal law. In answering that argument, the Supreme Court said *(l. c. 177)*:

> "It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction, without making any compensation, because, in the narrowest sense of that word, it is not TAKEN for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make

it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws of practices of our ancestors."

Discussing the origin and development of the rule thus announced, the Court used the following language *(l. c. 178-180)*:

"In the case of Gardner v. Newburgh, 2 Johnson's Chancery, 162, Chancellor Kent granted an injunction to prevent the trustees of Newburgh from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this, though there was no provision in the Constitution of New York such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. And he adds that the principles and practice of the English government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land which was considered as taking private property for public use, but which, under the argument of the defendant's counsel, would, like overflowing the land, be called only a consequential injury.

"If these be correct statements of the limitations upon the exercise of the right of eminent domain as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed on the Constitu-

tion it would become an instrument of oppression rather than protection to individual rights.

"But there are numerous authorities to sustain the doctrine that a SERIOUS INTERRUPTION TO THE COMMON AND NECESSARY USE OF PROPERTY MAY BE, in the language of Mr. Angell in his work on water-courses, EQUIVALENT TO THE TAKING OF IT, AND THAT, UNDER THE CONSTITUTIONAL PROVISIONS, IT IS NOT NECESSARY THAT THE LAND SHOULD BE ABSOLUTELY TAKEN. And perhaps no state court has given more frequent utterance to the doctrine that overflowing land by backing water on it from dams built below is within the constitutional provision, than that of Wisconsin. * * * We are not unaware of the numerous cases in the state courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. * * * But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that IT REMAINS TRUE THAT WHERE REAL ESTATE IS ACTUALLY INVADED BY SUPERINDUCED ADDITIONS OF WATER, EARTH, SAND OR OTHER MATERIAL, OR BY HAVING ANY ARTIFICIAL STRUCTURE PLACED ON IT, SO AS TO EFFECTUALLY DESTROY OR IMPAIR ITS USEFULNESS IT IS A TAKING WITHIN THE MEANING OF THE CONSTITUTION, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle."

In *Pennsylvania Coal Co. v. Mahon, 43 Sup. Ct. 158, 260 U. S. 393*, the Court held:

> "While some values incident to property are enjoyed under an implied limitation, and the government may to some extent diminish such values without compensation, the implied limitation is subject to limits, in view of the contract and due process clauses.
>
> "In determining the limits within which values incident to property may be diminished, under the police power, without compensation, the extent of the diminution is a fact for consideration.
>
> "While property may be regulated to a certain extent, if regulation goes too far, it constitutes a taking."

THE FACTS IN SUPPORT OF THE FOREGOING PROPOSITIONS OF LAW.

Let us apply the law to the facts in this case. On May 15, 1928, Congress passed "an Act for control of floods on the Mississippi River and its tributaries." This act adopted an engineering plan for flood control of the Mississippi River submitted by the Chief of Engineers, Major General Jadwin. One of the adopted features of this plan called for the construction in the Boeuf Basin of a diversion channel to divert from the Mississippi River at certain flood stages from 900,000 to 1,250,000 second feet of water. The purpose of this diversion is to lower the water in the Main River to its safe carrying capacity. This diversion channel will be constructed with guide levees on each side or on one side when the land on the other side is high and makes a natural levee. These guide levees will be connected with the Mississippi River and a low section

of levee is left in the River between the points where they connect. This section is called a Fuse Plug Section. The other sections of the levee above and below this Fuse Plug are constructed three feet higher and much stronger than the Fuse Plug Section, so that when the flood waters reach a certain stage they will automatically flow through the Fuse Plug and into the Boeuf diversion channel between the Guide levees. This Fuse Plug Section is constructed so that it cannot fail to function.

The respondent's property is located within the bounds of this Bouef Floodway and between the Guide levees. With a flood at the maximum contemplated by the plan, the quantity of water passing down the Bouef Diversion Channel will be between 900,000 and 1,250,000 second feet—over twice as much as has ever heretofore passed through this Basin. This will result in respondent's lands and other lands therein being submerged. The evidence shows that respondent's lands will be submerged to the extent of 16.4 feet and his improvements on same destroyed.

Respondent and those within the floodway will live under a constant menace, for no one can tell in what years conditions will require the use of their lands for the purpose intended by the plan—a designed floodway. Contrasted with these conditions with which respondent and others within the floodway will have to deal—those fortunate enough to own property behind these guide levees will be fully protected, including their improvements, livestock, and etc., and pursue their farming and other activities in perfect safety.

It is not to be disputed and there is no escape from the proposition, and the evidence in this case establishes beyond a doubt, that respondent's property and that of all others similarly situated in this diversion channel will be, by express design of the plan, compelled to bear the whole burden whenever the necessity arises. The Act itself (Section 9) specifically makes Secs. 14, 16 and 17 of the Rivers and Harbors Act of 1899 applicable to all lands, waters, easements and other property, and rights acquired or constructed under the provisions of the Flood Control Act, which will prevent any interference with the carrying out of the plan and purpose of the Act. This was done upon the recommendations of the Chief of Engineers in House document No. 90, 70th Congress, 1st Session, referred to as the adopted project, so that the Federal Government should have complete control over these floodways and designed diversion channels. It is likewise beyond question, that all those portions of the valley which have been heretofore subjected to the overflow waters of the Mississippi and its tributaries, which the adopted plan is designed to protect, will be entirely relieved, and the waters which they might otherwise receive will be carried to the sea, either through the main channel of the river, or through these proposed floodways—especially the Boeuf, which is expected to carry the major portion. These facts clearly establish that if the agencies of the government are permitted to proceed under the plan and construct these guide levees in the Boeuf Floodway, enclosing the lands and property of respondent in the bounds of said guide levees—it will amount to the taking of his property for public use, and will destroy its value and deprive him of its full use. It is admitted that the petitioners have not

and do not contemplate prosecuting any proceedings for the condemnation of flowage rights or any rights, title or easement through the Boeuf Basin and for respondent's land; or that they have purchased same; or that same has been donated for this purpose. The River and Harbor Act of July, 1918, under which the Secretary of War and the Chief of Engineers are directed to proceed when they desire to obtain flowage rights, easements, lands or rights of way, provides if they are unable to agree with owners as to price and they desire to get possession and begin work before the issue of value and compensation is determined, they may do so upon showing that the money to pay for such lands, easements or rights of way has been made available to the satisfaction of the Court. Under these facts we submit that the agencies of the Government are seeking to acquire respondent's property without due process of law and for public use, without just compensation.

We submit that the undisputed facts show, and as the Court below found, that if the guide levees were once constructed by the agencies of the Government—which guide levees will enclose respondent's land—this would constitute a taking under the Fifth Amendment. The only effect of this suit is to restrain the officers charged with the execution of the works which respondent alleges will consign his property for use as part of a floodway until they have complied with the required procedure under the statute.

Petitioners further contend that the Government is a necessary party to the suit, but that it must be sued in the Court of Claims upon an implied contract to pay for

what it has taken—or sued upon such implied contract in the District Court. It was sued in the District Court under the Tucker Act in this cause and properly sued—not for a taking, but in a Court of Equity to prevent an unlawful taking. The Tucker Act fully authorizes the United States to be sued in United States District Courts—both in law, Equity or Admiralty where the amount is under $10,000 and the cause arises under the Constitution or laws of the United States, and the case is not one sounding in tort. The case at bar is not one sounding in tort—but a proceeding in Equity to enjoin a trespass and remove a cloud. The Court sustained petitioner's motion to dismiss as to the United States—but as the other defendants were restrained it was sufficient to give respondent his remedy.

REPLY TO PETITIONER'S ARGUMENT.

A.

Counsel for petitioners have devoted seven pages of their brief under head of argument on page 23 to paragraph 3 on page 30 to the proposition that the flood control act does not require the United States to provide flowage rights over respondent's land, but that the act only required the United States to provide such flowage rights as are determined to be necessary by the Secretary of War and Chief of Engineers. The answer to this is that the Act itself provides that the United States shall provide flowage rights. Meaning if they are necessary to carry out the plan, and as some one had to be authorized to select the place where these flowage rights were to be pro-

vided, the Secretary of War and Chief of Engineers were designated for this purpose, and in the present case they have selected the lands of respondent as one place over which to provide these flowage rights in the Boeuf diversion channel. They have advertised for bids for the construction of guide levees so as to enclose this property. **See stipulation Rec. p. 29.** They have also surveyed the lands in this Boeuf diversion channel, located the lines of the guide levees and were actively at work preparing to take over this land as part of the Boeuf diversion channel.

General T. H. Jackson, President of the Mississippi River Commission and in charge of this work, testified as follows on pages 97-98 of the Record:

> "We are preparing to locate and construct guide levees, protection levees and side levees in the Boeuf Basin extending from Cypress Bayou fuse plug levee to Monroe or thereabouts to the west and going into the high ground in the vicinity of Sicily Island on the east."

Mr. Kemper, witness for respondent, testified that respondent's land would be in the middle of this Boeuf diversion channel (Rec. p. 33). Capt. Dean and Major Graves also testified that this work was being actively carried out. If these agents of the government, entrusted with the carrying out of the plan, have not been authorized by the Secretary of War and Chief of Engineers to so act, then they are arrant trespassers and interlopers and the injunction was properly granted. But, knowing the army, no one can sincerely think for a moment that these agents were acting without proper authority.

B.

Counsel for petitioners devote 18 pages of their brief, pages 30 to 48, to their proposition B, that the first paragraph of section 4 of the flood control act has no application to respondent's land. That this section only applied to intentional diversions by physical structures adapted to that end, as contemplated by the Bonnet Carre and Birds Point projects. The answer to this contention is that the language of the Act is clear and free from all ambiguity. It was not intended to apply to Bonnet Carre and Birds Point only, but at all points where **"additional destructive flood waters will pass by reason of diversions from the main channel of the Mississippi River."**

Again, Counsel say, on page 37 of their brief, that this first paragraph of Section 4 was only intended to apply to **Intentional Diversion.**

The adopted plan shows that additional flood water was intentionally to be diverted through the Bouef Diversion Channel and by physical structures adapted to that end, i. e. a Fuse Plug section of the main river levee, guaranteed to break, and constructed so as to break when the water in the main river reached a certain stage. If this was not intended as a diversion, why construct the guide levees to take care of this water when the fuse plug opened? It is in direct conflict with the plan to say that this additional flood water from the main river was not intentionally to be diverted. There is practically no difference between the Bouef Diversion Channel situation and Bonnet Carre. The Bonnet Carre floodway has a controlled spillway and is made to function mechanically. The

Bouef Diversion Channel has an uncontrolled spillway that **automatically** functions when the river reaches a certain height. Both are intended and designed for the same purpose—to divert water from the Mississippi River during flood stage.

C.

Counsel for petitioners in their brief under head of C, on page 49 of their brief, say:

> "Assuming that the first paragraph of Section 4 is applicable to respondent's land—neither the findings of the trial Court nor the evidence sustain the conclusion of the Court that the flood control plan will result in diversion of 'Additional destructive flood waters' upon the respondent's land."

Respondent's answer to this proposition is that it is a question of fact and the Court has found as a fact that "additional destructive flood waters" would be diverted upon the respondent under the flood Control Plan. And the Court was fully supported by the evidence. For the sake of convenience we will give a short resume of the evidence on this question—which is undisputed.

Under the adopted plan, all of the waters arising in the upper valley of the Mississippi River, and its tributaries, are confined to the main channel of the Mississippi and brought down in said channel to the back water area where the Arkansas and White Rivers empty into the Mississippi. This is accomplished by raising and strengthening the existing levees on the East and West banks of the river, sufficiently, to confine the flood waters to the channel, without crevasses occurring on either side.

From this point south the plan or rather the Army Engineers found that these flood waters when augmented by the floods from the Arkansas and White rivers could not safely be confined to the main channel of the Mississippi and that part of it must be diverted and taken to the Gulf through a separate channel; and they selected the Boeuf Basin for such channel.

It was determined that not less than 900,000 second feet of water should be diverted here, based upon past flood heights, in order to enable the main channel to carry safely the remaining flood waters, and that in the event of a possible super-flood as much as 1,250,000 second feet would be forced out through this Boeuf Diversion Channel.

The Boeuf or Tensas Basin has always been partially protected from floods by levees along the Mississippi river and the south bank of the Arkansas river, although prior to 1919, in major floods, some water passed into this territory through what was known as the Cypress-Creek gap, same being a gap left between the Arkansas and Mississippi river levees, where Cypress Creek flowed into the Mississippi, below the mouth of the Arkansas.

The closure of this gap was effected in 1919 and 1920, with the consent of Chief of Engineers of the United States and under the supervision of the Mississippi River Commission.

Since that date the Boeuf or Tensas basin has had equal protection from overflow with the rest of the valley and has not since been flooded from the waters of the Mississippi River, although it was inundated in 1927 from

breaks in the levees on the South bank of the Arkansas River.

The adopted plan, in order to insure the passage in flood time of from 900,000 to 1,250,000 second feet of water out of the Mississippi River and into and through the Boeuf or Tensas basin, provides for the enlargement and strengthening and the raising by approximately 3½ feet of all levees on both banks of the Mississippi River below the mouth of the Arkansas and on the south bank of the Arkansas River, except a stretch about 35 miles long, on the Arkansas side, extending from just below the mouth of the Arkansas to Luna Landing in Chicot County.

This 35 mile section is what, under the adopted plan is designated as the "Fuse Plug" at the head of the Boeuf Floodway. It is to be left in its present condition and neither raised nor enlarged.

This Fuse Plug section was designed to afford protection from floods reaching a stage of 60½ feet on the Mississippi gauge at Arkansas City and no more.

The adopted plan provides for all other levees on both banks of the river to withstand a flood reaching 62½ feet on said gauge, with additional height of one foot above that height, termed in the testimony, "a one foot freeboard".

The inevitable result of the carrying out of the adopted plan will and must be, that when the Mississippi River exceeds a stage of 60½ feet on the Arkansas City gauge, this fuse plug levee will be overtopped and washed away and from 900,000 to 1,250,000 second feet of water

will pass into the Boeuf Floodway, dependent upon the height to which the river goes thereafter. Captain John Paul Dean testifying on behalf of the defendants makes this very clear:

Q. "And therefore the stretch between nine hundred thousand cubic feet and one million two hundred and fifty thousand cubic feet— somewhere in there, is the amount of water which will be diverted in the event of a maximum flood through the Cypress Creek fuse plug levee and come down through the Boeuf Basin"?

A. "It is not for that purpose. It is for the purpose of passing whatever water may come in excess of the capacity of the main river at that time, which may or not be one million two hundred and fifty thousand cubic feet per second". (Trans. p. 77).

Q. "Is it not a fact that in 1927 the maximum flow down both the Boeuf and Tensas Basins was six hundred thousand cubic feet per second"?

A. "There were no direct measurements taken that I recall. However that estimate has been made and I know of no reason to believe it is seriously in error". * * *

Q. "Of which six hundred thousand cubic feet it has been equally well established that four hundred and fifty thousand feet passed down the Boeuf Basin and one hundred and fifty thousand feet passed down the Tensas Basin"?

A. "I think that is correct". (Trans. p. 78).

Q. "You have admitted that the plan while it would not make the water do anything, will render certain the fact that at a prede-

termined stage the waters from the Mississippi will pass through this fuse plug and go down the Boeuf Basin"?

A. "Yes". (Trans. p. 82).

Q. "Then your theory is that regardless of the secondary head that may be formed down there, it will, if the river gets to sixty-two and one half feet at Arkansas City, carry it out at the rate of one million two hundred and fifty thousand cubic feet"?

A. "That is one million two hundred and fifty thousand cubic feet per second could go down through there and the levees would take care of it. The side levees will not break. There is now enough there for that much to go out. The secondary head that comes in there will not prevent that much water going out if the river reaches the stage of sixty-two and one half feet. In the event of a major flood, considering the worst possible conditions under the assumption of one million two hundred and fifty thousand cubic feet per second, would be 82.9 feet above mean gulf level, and Mr. Kincaid's property that was measured by the survey that the Government Engineers ran, * * * is sixty-six and one half feet—a difference of 16.4 feet in depth at that point."

Q. "I will ask you if putting sixteen and four-tenths feet of water through this channel and over Mr. Kincaid's land would be destructive of the improvements on his place"?

A. "I believe it would."

Q. "Then it would be destructive, the flood water which would pass over his place under these conditions"?

A. "I think so." (Trans. pp. 82-83).

This is the testimony of the star witness for defendants, who was placed upon the stand to show that under the adopted plan, no additional destructive flood waters would be forced over the lands of complainant.

It is uncontroverted that the highest part of Kincaid's land was only overflowed to a depth of 4 feet in 1927 and that that was the greatest depth of water ever over same.

Mr. L. T. Berthe, Civil Engineer, a witness on behalf of Complainant, testified among other things as follows:

Q. "What effect will the carrying out of the adopted plan and the construction of the guide levees in the Boeuf diversion channel have upon lands in that channel"?

A. "It will increase both in volume and depth and the velocity of the flood flowing at all times, that diversion takes place at Cypress Creek. In other words at all times that the stage prescribed is exceeded, 60½ feet on the Arkansas City gauge * * * that will be destructive."

Q. "What will be the effect of building up all of the other levees on the Mississippi river both above and below the Fuse plug section, upon the fuse plug itself, in the event of a flood approximating the flood of 1927"?

A. "It will have no effect upon the fuse plug itself except that it will force the water to take that outlet over that particular reach of levee and IT WILL INCREASE THE FREQUENCY AT WHICH FLOODS WILL REACH STAGES OF 60½ FEET AND OVER, AT ARKANSAS CITY." (Trans. p. 45).

A picture of the condition of the Boeuf Basin when the adopted plan is completed is given by Mr. J. P. Kemper a Civil Engineer, testifying on behalf of Complainant:

Q. "Assuming the completion of the plans and the construction of the guide levees, the eastern guide levee which will cut off all water from going through the upper Tensas and the western guide levee which will prevent it from going over into Bayou Bartholomew, and an addition to the water already going through the fuse plug to this Boeuff floodway, I want to ask you to state what the result would be to the people and the land within that floodway, that diversion channel, with the levee giving way at 61½ feet at the Arkansas City gauge"?

A. "When the fuse plug levee would give way at a stage of 60½ feet, there would be stored in the basin at the mouth of the White and Arkansas Rivers an area of about 1,200 square miles of water to a depth of approximately 20 feet. The Kinetic energy of that volume of stored water is very great indeed. Now, if the fuse plug levee gives way, we will have that volume of stored water, fed by three great rivers, the Mississippi, the White, and the Arkansas, in volume 900,000 second-feet greater than can go down the Mississippi, past Arkansas City. I don't believe there is a record in this world of that volume of water stored with that much kinetic energy suddenly released under similar conditions into a confined area varying from about ten to fifteen miles wide, which must necessarily go down that basin in huge waves, amounting to almost a wall of water. It will tear everything that is movable in front of it. It will destroy houses, railroads, and highway bridges, and fences. Now it is true, after it reaches the

lower end of the basin and takes up its storage, its velocity will be less; but the damage will have already been done. There is nothing that I know of that is at all comparable to it except the Mounds Landing crevasse, and that was in much less volume. About half of it came out of the side of the Mississippi River below a bottle-neck effect where the levees on both sides of the river are very close to the bank, which resulted in a considerable reduction of the flood height on the gauge at Arkansas City. But if the Cypress Creek fuse levee breaks, it is going to come out of this solid stored area, and the basin right there at the river is twelve or fourteen miles wide. There would be no chance of any reduction until the dimensions of this break get great enough to absorb that 900,000 second-feet which is coming in excess of what can go down the river. That will place behind that volume of water such an energy that its destruction will just simply be enormous.

The ground fall of the land through the natural diversion channel in a distance of 180 miles, or thereabouts, is 100 feet, the greater portion of which is in the upper area which flattens out as you approach the Red River and from Cypress Creek to about the latitude of Monroe, or the first ninety miles, is probably seventy-two feet, a slope of about eight-tenths of a foot to a mile. Such a slope with such a volume of water must necessarily produce enormous velocity. It will probably have a diminishing ratio when it comes down to where the slope is less, and then when it begins to get choked down at Sicily Island Gorge it is bound to slow up and it is then going to slacken the velocity.

That gorge is only 8,000 feet wide, and to get 900,000 second-feet through a gorge 8,000 feet wide it must require a very great depth and great velocity. In the first instance, when the water first reaches there it will require a greater velocity than it will flow at a great depth through the gorge and the velocity will still be great until the pool below has been filled enough to slow it down.

I estimate that there are 70,000 people living in the Boeuf Basin.

These people will be driven from their homes on an average of once every four years. If they can save their livestock with them they will be at a great expense in taking care of their families and livestock, and if they are not able to do it themselves it would probabaly be done by charity. When those people return, if they do return, they would find their property practically destroyed, their houses gone, their fences gone, and everything they had, partly destroyed. It would be absolutely impossible for them to rehabilitate and plant crops for that year at all."

Q. "Now, Mr. Kemper, you have stated that your opinion as an engineer is that the flooding of this Boeuf Channel by the diversion of a fuse-plug levee would occur once in four years on an average"?

A. "That is borne out by my study of past records." (Trans. pp. 36-7-8).

This evidence clearly establishes the fact that the Court's conclusions were correct.

Counsel in their brief in Article II state:

> "Assuming that the respondent is entitled to compensation, he is not entitled to enjoin the prosecution of work on the Flood Control Project in the Boeuf Basin until such compensation is paid."

Respondent's reply to this proposition is that the Flood Control Act adopting the Engineers' Plan for Flood Control, expressly provides in Section 4 the means by which the Government may acquire the flowage rights, lands or easements or rights of way for use in carrying out the flood control plan.

The means provided by the Act itself are Sections 5 and 6 of the Rivers and Harbors Act of July 18, 1918. Section 5 of that Act expressly provides that before the United States can acquire possession of property, it shall first file its petition for condemnation, after which it shall have said lands and proceed with the public works thereon, only on the following conditions:

> "That certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled to either by previous appropriation by the United States or by the deposit of monies or other form of security in such amount and form as shall be approved by the court in which such proceeding shall be instituted."

There is no contention in this case that the Government has already taken possession of this property; but the contention is, if they are permitted to do the things that they are attempting to do, it will, in effect, amount to a taking; and this suit is to enjoin an unlawful taking in advance of compensation. With the construction of the

guide levees by the petitioners, they will be in possession of the property and no further act is necessary upon their part to reduce this property to governmental possession and to Federalize the channel in which this property is located. We have heretofore in this brief set forth the evidence covering this feature, it being testified that with the construction of the guide levees the Government will have to take no further physical act to reduce this property to its possession.

The contention of respondent is that he is not required to sit by and permit the Government to take his property in advance of either condemning same or purchasing same or having it donated. We admit the contention of counsel that if the property has already been taken, respondent's remedy would be upon an implied contract either in the Court of Claims or in the District Court for damages growing out of a breach of this contract. But no such case exists in this instance. Respondent is resisting the petitioners taking possession of the property until they have fully complied with the law, and the law expressly gives respondent this right and expressly requires the petitioners either to pay for the property or in condemnation proceedings to allege that an appropriation has been made to pay for same, or a deposit of money has been made in court sufficient to indemnify respondent.

We have already discussed in this brief the question of the Secretary of War and the Chief of Engineers authorizing the taking of this particular property in the carrying out of the flood control plan. It is reasoning to an absurdity to say that they do not intend and are not attempting to take the property of respondent as a part of

the Flood Control Plan. All of the petitioner's witnesses testified that they are seeking to do this. The plan contemplates that the property **shall** be taken. Bids have been advertised for the construction of the guide levees which would enclose respondent's property. It would be a physical impossibility to know the mental action of the Secretary of War and the Chief of Engineers, but where they have committed physical acts, these acts speak for themselves and the doctrine of *res ipsa loquitur* would apply.

Respondent is not required by law to sit idly by and permit his property to be taken without due process of law and without just compensation and for a public use. As set forth in the authorities under our proposition II, where State or Federal officials undertake to take property for public use without due process of law and without just compensation in advance of the taking, the remedy to stop and prevent this arbitrary, unlawful and highhanded act, is an injunction.

The Government has fully recognized, in carrying out the provisions of this Flood Control Act that condemnation proceedings were necessary if it desired to take possession or acquire property for use under the Act. It has instituted repeated suits in the Bird's Point-New Madrid situation, as is well known to the Government. It has instituted repeated suits in the Bonnet Carre Spillway. In these suits it has alleged that an appropriation has been specifically made to compensate for the property, and under this allegation has gone into possession of this property in advance of payment, as it could do under the Rivers and

Harbors Act, and as it could do should they commence condemnation proceedings against respondent under the same Act.

Counsel state that the Government contends that nothing which the petitioners have done or propose to do constitutes a taking.

The Court below under the facts has found that it will constitute a taking. The facts fully support the decree of the Court in this matter, and the fact that it may be years before this Boeuf Diversion Channel is flooded and respondent's property absolutely destroyed has no bearing whatsoever upon respondent's right to protect himself in advance of a taking without compensation.

We respectfully submit that whether or not one single drop of water ever passes through the designed Boeuf Diversion Channel, yet respondent would have a perfect right to enjoin its construction, as it is designed for the purpose of diverting this water, and when the water is diverted, his property would be destroyed.

Counsel further argue that as the Government cannot be sued in cases of this kind, and as it is only the act of the Government that can be challenged, its agencies cannot be sued. This is directly contradictory to the decisions of this Court, especially in the case of *Philadelphia Co. v. Stimpson* and other cases which we have heretofore cited.

In truth and in fact, the Government was sued and on its own motion was eliminated from the case, wrongfully in our opinion. But as the agencies of the Government

were also enjoined, we were not deprived of our remedy by the Government being let out.

We submit that the authorities cited by petitioners under this Section II have no bearing whatsoever upon the case at bar; and the purpose of this suit is to prevent property from being appropriated in advance of the agencies of the Government performing their legal duties in the matter.

In the case of *Kirk v. Good*, Appendix B to Counsel's brief, which counsel quote at page 67 of their brief, in which case Judge Davis said:

> "Awarding of the contracts for the construction of the set back levee and the execution of said contracts are not alleged to result in the appropriation and will not in fact result in the taking of any part of plaintiff's lands".

The bill in this case alleges and the respondent has established by evidence, and the Court below so found, that the execution and carrying out of the contracts for the construction of the guide levee tying on to the fuse plug section of the main river levee will result in the express appropriation of the respondent's property and has already resulted in depriving respondent of the free and unlimited use of his property; and if these agencies be permitted to build these guide levees under these advertised bids, respondent's property will then be absolutely taken, and his only remedy would be to sue the Government for damages for breach of an implied contract to pay, because this would be an actual physical possession upon the part of the Government.

That respondent is entitled to compensation for his property which is sought to be taken for public use is not to be questioned. That the petitioners are seeking to take respondent's property for public use is not to be questioned in the face of the evidence in this record and the Court's finding on that evidence. In connection with this, we call attention of the Court to the Report of Major General Jadwin, Chief of Engineers, submitting his Flood Control Plan to the Secretary of War. Page 3 and paragraph 2 of that report makes this statement. After stating the comprehensive purpose of the plan, he says:

> "It is designed to prevent any material increase in flood stages. Channel stabilization and navigation improvement are included. Exclusive of rights of way, incidental drainage and damages, if any, recommended to be borne by local authorities, the estimated cost of flood control work is $185,400,000.00 and of channel stabilization and mapping, $111,000,000.00, making a total of $296,400,000.00."

He further says:

> "The distribution of costs must be determined by law. The suggestion is made that a distribution by which the cost of flood control work in general is borne 80 percent by the Federal Government and 20 percent by the valley States, and the entire cost of channel stabilization is borne by the United States, would accord with the fiscal policy of the President and the precedent established by Congress."

The Court's attention is called to the fact that the Chief of Engineers did not state that this property was not to be paid for, but he recommended that it be paid for by the local authorities. Congress fully disposed of this fea-

ture of the report in Section 2 of the Flood Control Act, which has heretofore been set out in this brief. In substance it states that the local authorities have heretofore expended approximately $292,000,000.00 in protecting their interests in the alluvial valley of the Mississippi for protection against the floods of that river. In view of the extent of National concern in the control of these floods in the interest of National prosperity, the flow of interstate commerce and the movement of the United States mail, and in view of the gigantic scale of the project involving flood waters of a volume and flowing from a drainage area largely outside the states most affected and far exceeding those of any other river in the United States, **no local contribution to the project is required.**

The Chief of Engineers in his report to Congress also states it will possibly take more than ten years to carry out the project.

The Army Engineers, as is testified in this case, have attempted to do everything possible to evade the Fifth Amendment and to avoid paying the owners of property in the Boeuf Diversion Channel their just compensation. They are taking the position, and counsel for petitioners are so arguing, that leaving the fuse plug section in the main river with the levees higher above and below this fuse plug section will not be intentionally diverting the water from the main stream of the Mississippi River.

How they can conscientiously make such a statement or assertion is beyond our comprehension, as the plan expressly provides that the water is to be intentionally diverted through this fuse plug section and between these

guide levees. Unless it is so diverted, there is no flood control plan. **That the fuse plug section is intended to divert the water is evidenced by the fact that the Chief of Engineers who formulated the plan, expressly states that it cannot fail and, if necessary, the Government will put in inferior material or mix sand with the material so that it is sure to break and designedly function when the water reaches a certain stage.**

Major Ernest Graves, who possibly had more to do with this Flood Control Plan than any other officer connected with it, stated:

> "We spent a long time hunting for a place in the valley to take about the amount of water slope, width, depth, with moderate levees, and after very considerable consideration, decided that the Boeuf Basin was the only place. * * * We had impressions about how much money the United States would spend. We knew, of course, that the Court would have to finally decide the matter. We did not pretend to try it, **but we wanted to fix the scheme so that the Court would decide for the United States.** So we did not want to cut down any levee or reduce anything that a man had." (R. 92-93).

This is a positive declaration upon the part of the Government Engineers of War against the Fifth Amendment. A direct effort upon the part of the Government Engineers to evade the provisions of the Fifth Amendment as to just compensation. We will not term the method as unfair, as this might reflect upon the integrity of the Army Engineers, but we do term it as Army Engineer Strategy.

Unfortunately, the Fifth Amendment and the decisions of this Court construing the Fifth Amendment, ex-

pressly cover situations of this kind. It is the arbitrary and unlawful acts such as this upon the part of public officials that brought forth the enactment of the Fifth Amendment and the decisions of this Court that every right guaranteed thereunder should be protected in every instance, for the reason that public officials are given and gifted in its violation.

The original Constitution did not contain the Fifth Amendment, but shortly after the enactment of the original Constitution, encroachment on the part of the Federal Government was feared and this fear led to the speedy adoption of the first amendments to the Constitution.

Justice Miller in the *Slaughter-House Cases, 16 Wall. 36, 82,* says:

> "The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at this time from the federal power." These amendments were promised and insisted upon. "I hope," said Jefferson, "that a Declaration of Rights will be drawn up to protect the people against the federal government, as they are already protected in most cases against the state government."

The language of the Fifth Amendment was no new language of uncertain meaning. It was taken purposely from Magna Charta itself. The 39th Chapter of that document provides that "no ffreeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way destroyed; nor shall we go upon him, but by the lawful judgment of his peers or by the law of the land."

Judge John F. Dillon, in his work on the Laws and Jurisprudence, p. 208, of England and America, says as to this provision:

> "It was language not only memorable in its origin, but it had stood for more than five centuries as the classic expression and as the recognized bulwark of 'the ancient and inherited rights of Englishmen' to be secure in their personal liberty and in their possessions. It was, moreover, language which shone resplendent with the light of universal justice; and for these reasons it was selected to be put into the Fifth Amendment of the federal Constitution, as it had already been put into the charters and constitutions of the several states. Thus we see a general, fixed, and settled purpose in both the state and federal constitutions to protect and secure personal liberty, contracts, and private property".

And with respect to constitutional provisions of this nature, it was well said by *Mr. Justice Bradley*, speaking for the Court, in *Boyd v. United States, 116 U. S. 616, 635:*

> "* * * Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual deprivation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

The case at bar fully illustrates the necessity of protecting the people against the Federal Government and the unlawful acts of Federal officials.

The respondent in this case is one of 70,000 people living in the Boeuf Diversion Channel. The area of the Boeuf Basin Floodway from Cypress Creek to Sicily Island is about 2250 square miles. (See Testimony of Dean, R. 87).

This suit is but one of like kind that can be brought by every landowner whose property is being taken in the diversion channel. It was intended that this property should be paid for by someone and the Act says by the Government. It is clear from the statement of Major Graves quoted that the Government tried to devise some method by which they can escape payment. Unfortunately, they are met by the Fifth Amendment.

The third proposition in petitioner's brief at page 66 is as follows:

> "If the petitioners were not acting illegally, the District Court was without jurisdiction to entertain this action since the United States was an indispensable party thereto and had not consented to be sued."

The facts in this case answer this proposition. The petitioners were acting illegally, in that they are seeking to obtain the possession of respondent's property without first condemning, purchasing or having same donated and to apply same to a public use without just compensation.

The facts of this case do not differentiate in any particular from the facts and the authorities heretofore cited in this brief, especially the case of *Philadelphia v. Stimson.*

IN CONCLUSION.

The petitioners in this case have had their day in court. The record establishes beyond any question that they are attempting to take respondent's property for public use without just compensation and without due process of law. The evidence both on the part of respondent and upon the part of the petitioners themselves conclusively establish this fact and the Court below has so found and bases his decree upon these facts.

The opinion of the Court below has been carefully considered and affirmed by the Circuit Court of Appeals, and we submit that this Court should in no uncertain terms tell petitioners that they will not be permitted to take private property for public use without just compensation, and will affirm the decree of the Circuit Court of Appeals.

Respectfully submitted,

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